Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights

Rice v. Paladin Enterprises, 128 F.3d 233 (4th Cir. 1997)

In 1993, James Perry murdered three strangers, including a quadriplegic child. He undertook the murders for pay, having been hired by the ex-husband and father of two of the victims. Perry was hoping that this would be the start of an ongoing murder-for-hire business, and he was guided in his preparation for his new career by a 130-page book, "Hit Man: A Technical Manual for Independent Contractors." The relatives of the victims filed a civil action in federal district court against the publisher of the book, contending that Paladin Enterprises had aided and abetted the commission of a crime. Surprisingly, Paladin stipulated that the book was intended as a training manual for professional murderers but rested its defense on an absolute First Amendment protection to such instruction. The trial judge agreed and dismissed the suit. On appeal, a panel of the Court of Appeals for the Fourth Circuit reversed, holding that the First Amendment protected abstract advocacy of lawless action but not the "preparation" for lawless action through words. In an opinion laden with extended quotations from the book, the circuit court concluded the First Amendment did not protect from liability someone who instructed an individual on how to commit criminal acts. Rice *attracted the attention of many media organizations and civil liberties groups who urged the court to uphold constitutional protections for this publisher, but the court was not persuaded that Paladin was similarly situated to more mainstream publishers and speakers.*

How much guidance does Brandenburg v. Ohio *(1969) provide for resolving a case like this? How can we distinguish "mere advocacy" from preparation and instruction? Is instruction entitled to any First Amendment protection at all? If the detailed instructions were presented as part of a dramatic narrative, would that change the analysis? Would the simple provision of bombmaking instructions over the Internet be distinguishable from a book purporting to train hit men? If one individual taught another individual how to construct a pipe bomb while blowing up stumps in a field, would the teacher be liable if the second individual constructed a pipe bomb to injure a person?*

LUTTIG, JUDGE.

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In the seminal case of *Brandenburg v. Ohio* (1969), the Supreme Court held that abstract advocacy of lawlessness is protected speech under the First Amendment. Although the Court provided little explanation for this holding in its brief per curiam opinion, it is evident the Court recognized from our own history that such a right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty. Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.

However, while even speech advocating lawlessness has long enjoyed protections under the First Amendment, it is equally well established that speech, which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct, may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes. . . .

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Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech. While a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited. . . .

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Thus, in a case indistinguishable in principle from that before us, the Ninth Circuit expressly held in *United States v. Barnett* (9th Cir. 1982), that the First Amendment does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs. . . .

The principle of *Barnett*, that the provision of instructions that aid and abet another in the commission of a criminal offense is unprotected by the First Amendment, has been uniformly accepted, and the principle has been applied to the aiding and abetting of innumerable crimes.

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We can envision only two possible qualifications to these general rules, neither of which, for reasons that we discuss more extensively below, is of special moment in the context of the particular aiding and abetting case before us.

The first, which obviously would have practical import principally in the civil context, is that the First Amendment may, at least in certain circumstances, superimpose upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled. . . . That is, in order to prevent the punishment or even the chilling of entirely innocent, lawfully useful speech, the First Amendment may in some contexts stand as a bar to the imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose. . . . At the same time, it would not relieve from liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment. Like our sister circuits, at the very least where a speaker -- individual or media -- acts with the purpose of assisting in the commission of crime, we do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience. . . . This is certainly so, we are satisfied, where not only the speaker's dissemination or marketing strategy, but the nature of the speech itself, strongly suggest that the audience both targeted and actually reached is, in actuality, very narrowly confined, as in the case before us. Were the First Amendment to offer protection even in these circumstances, one could publish, by traditional means or even on the internet, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a skyscraper or public building, or for similar acts of terror and mass destruction, with the specific, indeed even the admitted, purpose of assisting such crimes -- all with impunity.

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The second qualification is that the First Amendment might well (and presumably would) interpose the same or similar limitations upon the imposition of civil liability for abstract advocacy, without more, that it interposes upon the imposition of criminal punishment for such advocacy. In other words, the First Amendment might well circumscribe the power of the state to create and enforce a cause of action that would permit the imposition of civil liability, such as aiding and abetting civil liability, for speech that would constitute pure abstract advocacy, at least if that speech were not "directed to inciting or producing imminent lawless action, and . . . likely to incite or produce such action." *Brandenburg*. . . .

Here, it is alleged, and a jury could reasonably find that Paladin aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder (replete with photographs, diagrams, and narration) so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in the preparation and planning, but in the actual commission of, and follow-up to, the murder; there is not even a hint that the aid was provided in the form of speech that might constitute abstract advocacy. . . . Moreover, although we do not believe such would be necessary, we are satisfied a jury could readily find that the provided instructions not only have no, or virtually no, noninstructional communicative value, but also that their only instructional communicative "value" is the indisputably illegitimate one of training persons how to murder and to engage in the business of murder for hire. . . .

Aid and assistance in the form of this kind of speech bears no resemblance to the "theoretical advocacy," . . . "the mere abstract teaching [of] the moral propriety or even moral necessity for a resort to force and violence," or any of the other forms of discourse critical of government, its policies, and its leaders, which have always animated, and to this day continue to animate, the First Amendment. Indeed, this detailed, focused instructional assistance to those contemplating or in the throes of planning murder is the antithesis of speech protected under *Brandenburg*. It is the teaching of the "techniques" of violence. . . . As such, the murder instructions in *Hit Man* are, collectively, a textbook example of the type of speech that the Supreme Court has quite purposely left unprotected, and the prosecution of which, criminally or civilly, has historically been thought subject to few, if any, First Amendment constraints. Accordingly, we hold that the First Amendment does not pose a bar to the plaintiffs' civil aiding and abetting cause of action against Paladin Press. If, as precedent uniformly confirms, the states have the power to regulate speech that aids and abets crime, then certainly they have the power to regulate the speech at issue here.

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Paladin and amici insist that recognizing the existence of a cause of action against Paladin predicated on aiding and abetting will subject broadcasters and publishers to liability whenever someone imitates or "copies" conduct that is either described or depicted in their broadcasts, publications, or movies. This is simply not true. In the "copycat" context, it will presumably never be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-a-vis the use intended, not, as here, used precisely as intended. It would be difficult to overstate the significance of this difference insofar as the potential liability to which the media might be exposed by our decision herein is concerned.

. . . . Moreover, in contrast to the case before us, in virtually every "copycat" case, there will be lacking in the speech itself any basis for a permissible inference that the "speaker" intended to assist and facilitate the criminal conduct described or depicted. Of course, with few, if any, exceptions, the speech which gives rise to the copycat crime will not directly and affirmatively promote the criminal conduct, even if, in some circumstances, it incidentally glamorizes and thereby indirectly promotes such conduct.

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The judgment of the district court is hereby *reversed*. . . .